IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 621 of 1996
WITH
CRIMINAL APPEAL NO.473 OF 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant
Versus
KISHORKUMAR LAXMIDAS - Opponent

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Appearance :

MS.PANDIT, ADDL. PUBLIC PROSECUTOR for Appellant In Criminal Appeal No.62l of 1996 and for Respondent In Criminal Appeal No.473 of 1998.

MS.TANHA PARIKH, FOR MR YOGESH S LAKHANI for Opponent In Criminal Appeal No.62l of 1996 and for Appellant In Criminal Appeal No.473 of 1998.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 21/12/2006

ORAL COMMON JUDGMENT

Both these appeals are arising out of the judgment and order of conviction and sentence passed by the learned Judicial Magistrate First Class, Mandvi-Kutchh rendered in Criminal Case No.l782 of 1992 on 26th April, 1996, whereby the accused was charged for the offence punishable under Sections 7 (1) and 7 (2) read with Section 16 (1-A) of the Prevention of Food Adulteration Act, 1954. The appellant accused was sentenced to undergo six months simple imprisonment and to pay a fine of Rs.2,000/-, in default thereof, further to undergo two months simple imprisonment.

2. Criminal Appeal No.621 of 1996 is preferred by the State of Gujarat for enhancement of sentence making grievance that the learned trial Judge ought to have imposed more harsh punishment in view of the nature of offence proved against the accused and no lenient view was required to be taken. The substantive sentence imposed is grossly inadequate.

3. The accused-convict has challenged the order

of conviction and sentence recorded by learned Judicial Magistrate First Class, Mandvi at Kutchh by filing Criminal Appeal before the District Court, Kutchh at Bhuj. On admission of the appeal preferred by the State for enhancement of the sentence, the Court has directed the Registry to get the appeal filed by the accused and pending before the Court of Sessions of District Kutchh at Bhuj treating the said appeal transferred to this Court. It was also ordered by the Court that the appeal against the order of conviction and sentence preferred by the accused-convict being Criminal Appeal No.473 of 1998 be heard alongwith the Criminal Appeal No.621 of 1996 filed by the State of Gujarat vide order dated 2nd May, 1998.

4. I have heard Ms.Tanha Parikh appearing for the accused-convict and Ms.Pandit, learned A.P.P., for the State in both these appeals simultaneously, because if the Court reaches to the conclusion that the order of conviction and sentence passed by the learned Judicial Magistrate First Class is legal and requires to be upheld then only the question of enhancement placed by the appellant-State would need

consideration.

5. Ms.Tanha Parikh has taken this Court through the entire evidence oral as well as documentary evidence led during the trial and it is submitted that the learned trial Judge has erred in holding that the accused is guilty of offence punishable under Sections 7 (1) and 7 (2) read with Section 16 (1-A) of the Prevention of Food Adulteration Act, 1954 and the reasons assigned by the learned trial Judge for recording conviction are contrary to the nature of offence and the legal point raised before the learned trial Judge. The order is assailed on various grounds mentioned in the memo of appeal preferred by the accused-convict. During elaboration, Ms.Parikh has concentrated her arguments mainly on one ground and it is submitted that the appellant at present would like to press into service the ground that the finding recorded by learned trial Judge in the background of Scheme of Section 13 (2) of the Prevention of Food Adulteration Act (hereinafter referred to as the **'Act'**) is not legal and proper and contended that the provisions of Section 13 (2) of

the Act were not applied in the correct and true spirit and the defence of the accused therefore can be said to have been seriously prejudiced.

5.1 To appreciate the submission of learned Counsel, I would like to state the fact of the case in brief. It is alleged that original complainant-Food Inspector purchased the sample of chilly powder from the shop of accused No.1. The said chilly powder was supplied by original accused No.2 – Vinodkumar Nanji Thakkar to original accused No.1. The original accused No.3 was the manufacturer of that chilly powder. The original accused No.1 had died pending the trial and therefore the prosecution against him was treated as abated and the Court has acquitted the original accused No.2 giving benefit of Section 19 (2) of the Act as warranty holder. However, the original accused No.3-manufacturer was found guilty. No appeal is preferred against the order of acquittal passed of original accused No.2; nor such fact has been pointed out to the Court by the Counsel.

5.2 Ms.Parikh has developed her argument after reading paragraph No.18 of the impugned judgment. It is submitted that this Court should see the relevant dates emerging from the documentary evidence led by the prosecution and submitted that when the accused was served with the statutory notice under Section 13 (2) of the Act, the date of sample had already expired and therefore it was not remained fit for any re-analysis. The learned Judge has negatived the contention keeping in mind the alleged adulteration found by the public analyst. It is submitted that the report of the Public Analyst also had not been read correctly, because the report (Exh.40) which is at page 93 of the paper-book does not speak about the presence of added colouring matter. At serial No.5 of the second column (Characteristics Examined) of the tabular format of the report wherein it is mentioned as under;

> “5. Added colouring matter: Non permitted pink coloured oil soluble coal tar dye detected – Absent”

According to analyst sample of chilly powder was

found with pink colour and that colour was soluble in oil. According to learned J.M.F.C. the nature of adulteration found would not have any relation with the date of expiry of the sample and it was the duty of the accused to challenge the finding arrived at by Public Analyst and it was open for him to request the Court to send the sample for second analysis to Central Food Laboratory, Kolkata (hereinafter referred to as **'C.F.L.'**). However, the accused has not availed the opportunity and therefore he cannot take advantage of scheme of Section 13 (2) of the Act.

5.3 Ms.Parikh has placed reliance on more than one judgments and it is submitted that there was no need to request the Court for second analysis and to send the sample to C.F.L., because it had reached to its expiry date and therefore the sample was not remained worthy for analysis by which the accused can prove that from all corners and relevant standards the sample cannot be termed as adulterated within the meaning of the Act. Of course, she has cited some decisions wherein the sample was sent to C.F.L. also

the case where the sample parcel had not reached in a sealed condition to C.F.L. According to her, the date of expiry of the food article mentioned on the back is also indicative of one clear fact that the food article would not remain worthy and of relevant standard and therefore the same should not be used as food article.

6. The Court finds ample force in the submissions especially in the background of the following facts.

1. The date of taking sample as per evidence was 5th December, 1991.
2. It was sent for analysis to the public analyst on vide letter 6th December, 1991.
3. The Food article was received by Public analyst on 19th December, 1991.
4. The food article was analyzed by the public analyst on 31st December, 1991, so it was possible to infer that the report must have been received by the complainant-Food Inspector in the first week of January, 1992.
5. The date of expiry mentioned on the sample which

was collected from the shop of deceased-original accused No.1 indicates 9th May, 1992. So the sample was worthy for analysis upto 9th May, 1992.

6. The public analyst had sent the report on 2nd January, 1992 and it was dispatched on 3rd January, 1992 so there was no reason which can be said to be justifiable for the complainant-Food Inspector to retain the report with him for a long period upto 9th August, 1992.

7. The Food Inspector ought to have sent the Notice under Section 13 (2) of the Act before 9th May, 1992.

So any of the accused can request the Court to send the sample for second analysis to C.F.L. But on one hand the complainant keeps curtain on the finding arrived by the Public Analyst or retains the report with him till the date of expiry of the sample i.e. 9th May, 1992 and on the other hand even thereafter sends notice on 9th August, 1992. In this situation the accused can positively state that this delay has resulted into serious prejudice to him and after

several months from the date of expiry, there was no use of sending the sample for second analysis.

7. It is not necessary for the Court to refer the decision of the Hon'ble Apex Court filed by the learned Counsel whereby the Apex Court has analyzed the scheme of Section 13 (2) of the Act and the legal and consequential effect of the report given by C.F.L. The finding adverse to the person who opts to go for second analysis even if is different then the finding recorded by the Public Analyst, can bind the accused and he can even challenge the finding recorded by C.F.L. Therefore, it is rightly argued by Ms.Parikh that it was not sent for second analysis because the sample had not remained worthy for analysis on account of its expiry.

8. Ms.Parikh has drawn attention of this Court to the following decisions.

1. **(1981) 3 Supreme Court Cases 72 in case of Chetumal Vs. State of Madhya Pradesh and Another;** wherein, the Apex Court has observed

that report of Central Food Laboratory supersedes the report of Public Analyst. In this cited decision, the Director found that seal of the sample sent for analysis does not tally with the seal of the container.

2. In another decision **A.I.R. 1967 S.C. 970 in case of Municipal Corporation of Delhi Vs. Ghisa Ram;** wherein the sample sent for analysis to C.F.L. was found decomposed. The Apex Court has considered the inordinate delay in prosecution.

Here, in the present case the inordinate delay has been made in intimating the accused No.3 with the notice under Section 13 (2) of the Act.

The anxiety of the Court in such technical case always has remained the same that the mandatory provisions should be complied with meticulously and non-compliance of mandatory provisions is sufficient to even presume the prejudice. In the present case, it appears that the serious prejudice was caused to

the accused for non-service of notice well in time and it is wrong to say that a person who wants to take advantage of scheme of Section 13 (2) has no role to play is the law. But, it would not be relevant because the present case is not a prosecution on account of mis-branding.

9. The Court is in agreement with the submissions made by Ms.Parikh that the ratio of decision in case of **State of Haryana Vs. Unique Farmid (P) Ltd. & Anothers reported in (1999) 8 S.C.C. 190;** would squarely apply to this case. For the sake of convenience and and brevity, I would like to reproduce the paragraph 11 of the judgment, which reads thus:-

"Sub-section (1) of Section 30 which appears to be relevant only prescribes in effect that ignorance would be of no defence but that does not mean that if there are contraventions of other mandatory provisions of the Act, the accused have no remedy. The procedure for testing the sample is prescribed and if it is contravened to the prejudice of the accused, he certainly has the right to seek dismissal of the complaint. There cannot be two pinions about that. Then in order to safeguard the right of the accused to have the sample tested from the Central

Insecticides Laboratory, it is incumbent on the prosecution to file the complaint expeditiously so that the right of the accused is not lost. In the present case, by the time the respondents were asked to appear before the Court, the expiry date of the insecticide was already over and sending of the sample to the Central Insecticides Laboratory at that late stage would be of no consequence. This issue is no longer res integra. In State of Punjab Vs. National Organic Chemical Industries Ltd. this Court in somewhat similar circumstances said that the procedure laid down under Section 24 of the Act deprived the accused to have the sample tested by the Central Insecticides Laboratory and adduce evidence of the report so given in his defence. This Court stressed the need to lodge the complaint with utmost despatch so that the accused may opt to avail the statutory defence. The Court held that the accused had been deprived of a valuable right statutorily available to him. On this view of the matter, the Court did not allow the criminal complaint to proceed against the accused. We have cases under the Drugs and Cosmetics Act, 1940 and the Prevention of Food Adulteration Act, 1954 involving the same question. In this connection reference be made to decision of this Court in State of Haryana Vs. Brij Lal Mittal under the Drugs and Cosmetics Act, 1940, Municipal Corporation of Delhi Vs. Pawan Kumar Saraf all under the Prevention of Food Adulteration Act, 1954."

10. Of course the above cited decision is qua

the insecticide case of 1968, but the Court was dealing with the sample analyzed from C.F.L. at the request of the accused and the Court found that the request was not complied with within the statutory time limit. The Apex Court has observed that the respondents in this appeals have been deprived of their valuable right to have the sample tested from C.F.L. under sub-section 4 of Section 24 of the Act.

10.1 In the case on hand the accused has been deprived of his right by not informing well in time before the date of expiry of the sample.

11. This Court (Coram: C.K.Buch, J.) has considered the similar aspect while dealing with the case of **Sagar Agro Chemicals Vs. State of Gujarat in Criminal Misc. Application No.5210 of 2000 decided on 30th January, 2002;** wherein the petitioner has prayed to quash the criminal complaint for the offence punishable under Sections 29 (1) of the Insecticides Act. I would also like to reproduce the relevant paragraphs No.4 and 5 of the judgment;

"4. In the instant case, it has been submitted by learned Counsel, Mr.Lakhani for the petitioners

that if two major legal issues are considered in the context of undisputed facts available on record, the prosecution against the petitioners is not sustainable and, therefore, the same should turned down. The present petitioners do not say that they were not responsible for keeping or selling questioned insecticides, but it is contended that even if the report of Insecticide Analyst is accepted as true or correct, even then the prosecution against the present petitioners is not sustainable. The certain facts are brought to the notice of this Court and it would be proper to state the same in brief:-

(i) *Insecticide known as "Sungor – 30-B.C." was taken in the packed container by way of sample by the Insecticide Inspector on 22.8.1991.*

(ii) *The date of manufacture of Insecticide is January, 1991.*

(iii) *The sample was sent for analysis on 26.8.1991.*

(iv) *On 5.9.1991, report of Insecticide Analyst was prepared and it was found that the active substance Diemthoate was 26.02 % at the place of 30% as mentioned on the sample. (emphasis supplied).*

(v) *AS the percentage was not found as per the percentage printed over it, the sample was declared as misbranded.*

(vi) *complaint filed Criminal Complaint on*

17.2.1992.

(vii) On service of summons and after appearing before the Court, the accused requested on the first day to send sample to Central Insecticide Laboratory vide application exh.7 on 30.3.1992.

(viii) On 5.4.1993 i.e. after more than one year, learned Chief Judicial Magistrate allowed the application and directed the complainant to tender the sample in the Court so that same can be sent for analysis to the Central Laboratory. Accused was also directed that they shall have to pay the costs for such re-testing.

(ix) Shelf life of the sample was to expire in the month of November, 1992. so, on the day on which the Court allowed the application exh.7, shelf life of the sample had already expired.

5. It has been pointed out from facts that the Insecticide Inspector had also taken sample of some insecticide of the very same batch i.e. Batch No.SC-5 from the trader of Rajkot in the month of June, 1991 and it was sent for analysis at Gandhinagar and as per the report of Analyst dated 31.8.1991, Dimethoate was found 30.58 % against 30% printed on the container. Thus the sample taken from Rajkot, sent for analysis was found "confirmed". In other words,

the same was not declared misbranded."

12. So according to me, sending of the sample to C.F.L. as observed by the trial Court might have resulted into serious prejudice or a futile exercise because that report could not have been used by prosecution or by the accused, being a report of analysis of an expired sample having expiry date and that to after the date of expiry.

13. Without entering into further detailed discussion, the Court is inclined to accept the say of Ms.Tanha Parikh that the reasons assigned by the learned trial Judge in paragraph No.8 are contrary to the mandatory provision and scheme of Section 13 (2) of the Act. The accused was required to be given the benefit of this fact situation and, therefore, he is entitled to acquittal or at least he could have been given a benefit of doubt.

14. Ms.Pandit, learned A.P.P., of course has tried to submit that the application of Section 13 (2) and the entire scheme should be considered in the background of facts of each case and the present case

on hand is of a different type and the Court should uphold the ultimate finding of conviction and pass appropriate order at least to convert the simple imprisonment into rigorous imprisonment and the amount of heavy fine should be imposed because he is a manufacturer and not a dealer or a vendor in a small village.

15. In view of the discussion made herein above, the Court is not able to accept the say of learned A.P.P., Ms.Pandit.

16. In the result Criminal Appeal No.621 of 1996 preferred by the appellant-State of Gujarat for enhancement of sentence is hereby dismissed and Criminal Appeal No.473 of 1998 preferred by the appellant-original accused No.3-Kishorekumar Laxmidas is hereby allowed. The judgment and order dated 26th April, 1996 rendered by the learned Judicial Magistrate First Class, Mandvi-Kutchh in Criminal Case No.1782 of 1992 is hereby quashed and set aside. The appellant-original accused No.3-Kishorekumar Laxmidas is acquitted of all the charges levelled against him. Bail bond, if any, shall stand discharged.

(C.K.BUCH, J.)

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